IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1039 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ISHWARBHAI MAGANBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR BK DAVE for the appellant

Mr. A.J. Desai, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 04/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant has filed this appeal under Section 374(2) of the Code of Criminal Procedure, 1973, ('Code' for short), against the judgment and order dated August 6, 1997 passed by the learned Additional Sessions Judge, Valsad, in Sessions Case No.115 of 1996 by which judgment and order, the appellant was convicted under Sections 302 and 452 of the Indian Penal Code ('IPC" for short) and sentenced to undergo the R.I. for life and fine of

Rs.5000 in default S.I. for six months.

2. It is the case of the prosecution that the incident in question had taken place on November 5, 1995 at 20 hrs. at village Ponsari in the locality called 'Sui Talavdi', Taluka: Gandevi, District Valsad. At that time, the appellant, along with two other persons, Bipinbhai Nanubhai Patel and Mohanbhai Dhirubhai Patel (original accused Nos. 2 and 3) who were also alleged to have been carrying the weapons, axe and stick respectively, entered into house of deceased, Shailesh, and the appellant because of old dispute of cutting tree of Khajoori had a quarrel with the deceased and in that quarrel had given a knife blow on the back side of the deceased, which resulted into pulmonary artery being cut, with the result, the deceased succumbed to injuries.

3. Charge Exh.31 was framed against the appellant and other two accused persons. The charge was read over and explained to the appellant and other two accused persons. The appellants and other two accused persons had pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution led oral as well documentary evidence against the appellants and other two accused persons to substantiate the charge.

3.1 To prove the charges framed against the appellant and other two accused person, the prosecution examined (1) P.W.1, complainant, Dilipbhai Premabhai, who happens to be the brother of deceased Shailesh, Exh.15, (2) P.W.2, Baviben Dilipbhai, wife of P.W.1, Exh.17, (3) P.W.3, panch witness, Dhirubhai Jivanbhai, Exh.20, (4) P.W.4, panch witness, Bhupendrabhai Mangubhai, Exh.21, (5) P.W.5, Paragbhai Bhagabhai, Exh.23, (6) P.W.6, Manjuben Manubhai, sister-in-law of the complainant P.W.1, Exh.24, (7) P.W.7, Gandabhai Premabhai, brother of the deceased, Exh.27, (8) P.W.8, Dr. R.N. Patel, Exh.25, and (9) P. W.9, Investigating Officer, PSI, R.G. Desai, of Bilimora Police Station, Exh.27. The prosecution produced documentary evidence in the nature of inquest panchanama Exh.10, panchanama of clothes put on by the deceased, Exh.11, first information report lodged by P.W.1, Exh.16, panchanama of scene of offence Exh.19, recovery panchanama of muddamal article, knife, Exh.22, panchanama of clothes put on by the deceased, Exh.11, post-mortem report Exh.26, report of FSL Exh.28, and serological report Exh.29.

3.2 After recording of evidence of prosecution witnesses was over, further statements of the appellants

and other two accused persons were recorded under Section 313 of the Code of Criminal Procedure, 1973. In their statements, they had denied the case of the prosecution.

4. The learned Additional Sessions Judge, after hearing the arguments of the prosecution and the defence, came to the conclusion that the prosecution had proved beyond doubt that deceased Shaileshbhai died homicidal death. It was held that the prosecution had failed to prove that the original accused Nos. 2 and 3 had shared common intention with the appellant to cause murder of deceased Shaileshbhai. However, the learned Additional Sessions Judge held that the prosecution had proved beyond doubt that the appellant (accused No.1) had given a knife blow to the deceased in a cruel manner and the injury caused by the knife blow was sufficient in the ordinary course of nature to cause murder of the deceased. The learned Additional Sessions Judge further held that the appellant had committed trespass in the house of the deceased to commit illegal acts. The learned Additional Sessions Judge further held that the original accused Nos. 2 and 3 did not commit trespass in the house of the deceased nor they had common intention with the appellant to commit the offence of trespass or with intention to commit illegal acts. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge has convicted the appellant for the offence under Section 302 read with Section 452 of the IPC, and sentenced him to undergo R.I. for life and to pay fine of Rs.5000/- in default S.I. for six months, which has given rise to filing of the present appeal by the appellant.

5. Learned counsel Mr. B.K.Dave, appearing for the appellant and learned Additional Public Prosecutor, Mr. A.J. Desai, have taken us through the entire evidence produced by the prosecution.

6. The learned counsel for the appellant has submitted that the evidence of the eye-witnesses was contradictory to each other. It is submitted that P.W.1, Dilipbhai Premabhai and his wife P.W.2, Baviben Dilipbhai had deposed that the incident had taken place while the appellant and the deceased were sitting on the ground, whereas, P.W.6, Manjuben Manubhai, and P.W.7, Gandabhai Premabhai, had deposed that the knife blow was given to the deceased while the appellant and the deceased were standing. The learned counsel for the appellant has further submitted that, if the evidence of P.W.1 and P.W.2 was acceptable, then it could not have been possible for the appellant to give knife blow on the

abdominal part of the deceased and, therefore, in view of the contradictory evidence of the eye-witnesses, the benefit of doubt should be given to the appellant. The learned counsel for the appellant has further submitted that, according to the evidence of the P.W.8, Dr. R.N. Patel, the injuries sustained by the deceased, which were noted in the post-mortem notes, could not have been caused by the muddamal knife. The learned counsel for the appellant has further submitted that the incident had taken place in a fraction of seconds as deposed by the P.W.1, complainant, Dilipbhai Premabhai and there was heated exchange of words between the deceased and the appellant because of the dispute with regard to cutting of one khajoori tree, for which Rs.300 were given by the appellant to the deceased before two years of the date of the incident. In this connection, it is, alternatively, submitted by the learned counsel for the appellant that the incident had taken place as a result of trivial dispute between the appellant and the deceased and the appellant had no intention to cause murder of the deceased nor he can be said to have the requisite knowledge that the death would otherwise be the inevitable result. The learned counsel for the appellant has further submitted that, due to inflicting of one blow and that too on the back of the abdominal part of the deceased, which ultimately resulted into cut of pulmonary artery, the deceased succumbed to the injuries. The learned counsel for the appellant has further submitted that the appellant had given only one blow with a small knife and, therefore, at the most the offence would fall under Section 304 Part I or Part II of the IPC. In this connection, the learned counsel for the appellant has invited our attention to the judgment of the Supreme Court in the case of K. Ramakrishnan Unnithan vs. State of Kerala, reported in AIR 1999 Supreme Court 1428. The learned counsel for the appellant has lastly submitted that the learned Additional Sessions Judge has failed to appreciate that the appellant had given only one blow which was not given on any vital part of the deceased, and he has no intention or requisite knowledge to cause murder of the deceased and at the most the offence would fall under Section 304 part II of IPC and, therefore, this Court may take a lenient view of the matter and allow the appeal since the appellant is in the custody since more than six years.

7. Mr. A.J. Desai, learned Additional Public Prosecutor, submitted that the evidence of the eye-witnesss had proved that, prior to giving the knife blow, the appellant had committed a trespass in the house of the deceased and, therefore, heated exchange of words

took place and the appellant had abused the deceased as there was dispute with regard to one khajoori tree. It is submitted that the eye-witnesses had narrated in detail about the occurrence of the incident and, therefore, their testimony was natural. He submitted that, in view of the satisfactory evidence led by the prosecution to prove the charge against the appellant, the appeal should be dismissed.

8. We have considered the submissions advanced at the Bar and reappreciated the whole evidence on record.

9. It is true that the prosecution witnesses who are called eye-witnesses are closely related to the deceased who were present at the place of the incident. The testimony of eye-witnesses makes it clear that the incident had taken place as a result of heated exchange of words between the appellant and the deceased. Due to sudden provocation, the appellant had given the knife blow on the back side of abdomen of the deceased, which had resulted into the death of the deceased. The size of wound as noted in the post-mortem report was 2.5 x 1/2 cm back on the left side approximately 2 cm from midline in the 8th space in an upward and medial direction. The size of injury and the portion on which the knife blow was given would show that the appellant had no intention to cause murder of the deceased. Unfortunately, the knife blow had cut the pulmonary artery which had resulted into heavy loss of blood as a result of which the deceased succumbed to death. The appellant had not acted in a cruel manner nor had he given the knife blow on any vital portion to cause murder of the deceased. As noted earlier, the incident in question had taken place on account of a trivial dispute between the appellant and the deceased as the deceased had given Rs.300/- before two years for cutting the khajoori tree. As such, there was no motive to cause murder of the deceased. It had taken place all of a sudden due to grave and sudden provocation and due to heat exchange of words between the appellant and the deceased. The oral and the medical evidence led by the prosecution, in our view, do not establish that the appellant had inflicted the knife blow in a cruel manner and he had selected the vital part of the deceased to cause murder. The appellant had no intention to cause murder of the deceased. The offence would, therefore, at the best fall under Part II of Section 304 of the IPC.

10. In the case K. Ramakrishnan Unnithan (supra), the facts were that the appellant had given a single blow which was quite severe as a result of which intestine of

the deceased protruded. The appellant had no animosity against the deceased and he was involved because of the altercations with the son of the deceased. The Supreme Court had set aside the conviction of the appellant under Section 302 and, instead, convicted him under Section 304, Part II. In the present case also, the appellant had no animosity with the deceased and the incident had taken place as a result of trivial issue with regard to cutting of the khajoor tree. Because of the heated exchange of words, the appellant had given a single knife blow on the deceased, which had resulted into cut of pulmonary artery and caused death of the deceased. The appellant had not acted cruelly nor he had selected the vital part on the body of the deceased to cause the murder. Further, the appellant had no intention to cause the murder of the deceased. The facts emerging from the evidence led by the prosecution establish that, at the best, the offence committed by the appellant would fall under Section 304 Part II of the IPC. We, therefore, quash and seta side the conviction of the appellant under Section 302 of the IPC and instead convict him under Section 304, Part II, of the IPC.

11. The conviction of the appellant under Section 452 of the IPC is eminently just and proper and the evidence led by the prosecution had proved beyond doubt that the appellant had committed trespass into the house of the deceased after having made preparation for causing hurt to the deceased. The conviction of the appellant under Section 452 of the IPC is, therefore, confirmed and maintained.

12. As a result of foregoing reasons, the appeal is partly allowed. The order of conviction under Section 302 of the Indian Penal Code recorded by the learned Additional Sessions Judge, Valsad, by the judgment and order dated August 6, 1997, rendered in Sessions Case No.115 of 1996 and the sentence to undergo the R.I. for life and fine of Rs.5000 in default S.I. for six months, is quashed and set aside and is converted into conviction under Section 304, Part II, of the Indian Penal Code. The appellant is sentenced to undergo R.I. for seven years and fine of Rs.1000 in default S.I. for two months. No separate sentence is being awarded for the offence under Section 452 of the Indian Penal Code. The muddamal be disposed of in terms of the directions given by the learned Judge of the trial court in the impugned judgment.

July 4, 2002 (M.H. Kadri,J.)

(Sharad D. Dave, J.)

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